Jednotlivé nároky z porušení smlouvy

Date: 26.10.2004
Country: France
Number: --
Court: Cour d'Appel de Poitiers
Parties: --

Abstrakt:[1]

A Spanish seller and a French buyer concluded a contract for the sale of technical equipment. The goods were delivered but the buyer refused to pay the price alleging delay in delivery and non-conformity of goods. Moreover, it claimed for set-off between damages it had suffered as a result of non-performance and the price contractually agreed upon.

The first instance Court ruled in favour of the seller. The appellate Court upheld the lower Court's decision.

First of all, the Court of Appeal held CISG applicable in the case at hand as both parties were situated in contracting States (Art. 1(1)(a) CISG).

With respect to the alleged late delivery, the Court found that, notwithstanding the fact that the orders placed by the buyer expressly cointained the clause "urgent", the seller effected the first delivery only two months after receipt of the order (the remaining deliveries being performed within the two following months). However, the buyer neither required performance by the seller as provided by **Art. 46 CISG**, nor fixed an additional time for performance under **Art. 47(1) CISG**. Moreover, there was no evidence that the penalties for late delivery paid by the buyer in favour of the final customer were due to a delay in delivery on the part of the seller. Consequently, the Court held that the buyer had failed to provide adequate proof both as to the fact that a time for delivery had been fixed and that delivery had not been effected within that period.

The appellate Court rejected also the claim concerning the lack of conformity of the goods, holding that the buyer had failed to give notice thereof within a reasonable time (**Arts. 38 and 39 CISG**). Even if the buyer had succeeded in demonstrating that the goods were defective and that the defects could have been identified only after a period of usage, a notice of non-conformity 13 months after the issue of the last invoice (as it was in the case at hand) could not be deemed as timely.

Finally, the appellate Court confirmed the first instance decision as to calculation of interest to be paid by the buyer. Absent an express indication as to the time of accrual of interest in Art. 78 CISG, it was appropriate to calculate interest not as from the time when payment had fallen due (as put forward by the seller), but as from the time indicated in the seller's pleadings.

[1] Text celého rozhodnutí je k dispozici na adrese: http://cisgw3.law.pace.edu/cases/041026f1.html

Date: 03.04.2006
Country: Germany
Number: 16 U 17/05
Court: Oberlandesgericht Köln
Parties: --

Abstrakt:[2]

A German Buyer ordered orally from a Dutch Seller strawberry plants. However, after a first purchase of a certain quantity of plants, the second purchase of the was changed to a bigger number of plants. The final price was kept the same because of the superior quality of the replacing plants. The Seller issued two invoices including a 6% Dutch sales tax. The Buyer made two partial payments, refusing to pay the tax. The Seller brought an action against the Buyer to obtain the remainder of the price, together with pre-procedural costs, such as collection and attorneys' fees.

The First Istance Court dismissed for the most part the seller´s claim. The seller appealed.

The Appellate Court held that, since both contractual parties have their place of business in different Contracting States (Art. 1(1)(a)), the contract was governed by CISG, the applicability of which had not been excluded by the parties.

As to merits, in the opinion of the Court the interpretation of the parties´contractual statements, which had to be carried out according to CISG's provisions (Art. 8 CISG), led to the conclusion that the Buyer was obliged to pay the Dutch sales tax (**Art. 62 CISG**). Indeed, the Buyer never contested either the invoice issued nor the further writing of the Seller, which expressly referred to the fact that the Buyer had to pay the sales tax. Therefore it could be assumed that the parties wanted to adhere to the existing Dutch tax law. However, only part of the amount claimed by the Seller was considered as unconditional; for the rest, the maturity of Seller's claim depended on the issuing of a correct modified invoice on Seller's part in accordance with the contractual agreement (**Art. 58 CISG**).

As to the collection costs, the Court held that, even if CISG does provide a basis for a claim (Art. 74), the Seller did not adequately proved how these costs were to be calculated, nor if and when they accrued.

As to the pre-procedural attorneys'fees, the Court held that their recovery fell outside the scope of Art. 74 CISG, because at the time the Seller made recourse to the lawyer it could no longer count on further payments by the Buyer without judicial help, since the Buyer had already settled the price for the deliveries except for the sales tax and a small remainder.

Finally, the Seller was awarded payment of interest according to Art. 78 CISG as far as the monetary claim was mature. The interest rate was determined by the domestic law otherwise applicable to the contract (i.e. Dutch law), absent an express provision in CISG.

[2] Text celého rozhodnutí je k dispozici na adrese: http://cisgw3.law.pace.edu/cases/060403g1.html

Date: 22.05.2006
Country: Spain
Number:
Court: Juzgado de Primer Instancia, n. 3 de Badalona
Parties: Wolfram R. Seidel GMBH, Crotton S.A.

Abstrakt:[3]

A German buyer and a Spanish seller entered into an agreement for the sale of cars. The agreement provided that the seller would deliver the goods to Dubai, while the buyer would pay for the price and transportation costs before the goods were to be delivered. The agreement also provided that the buyer would subsequently sell the goods to its own customers in the Middle East. Before delivery, the seller became aware that the buyer's customer was probably planning to resell the goods in Japan, where the seller already had an exclusive distributor. The seller therefore notified the buyer that it would not deliver the goods. The buyer then asked the seller to fulfill its obligations, but the seller refused to do so. However, the seller returned the entire amount paid by the buyer for the goods minus € 257.12 for bank costs. The buyer then filed a suit for the outstanding amount, plus interest. It also asked lost profits as a result of its inability to resell the goods to its own customer, as well as legal fees. In doing so, the buyer argued that it had fulfilled all of its obligations under the contract and that it had no obligation to guarantee that its customer would not resell the goods outside the region. On its part, the seller asserted that the buyer had breached its obligation to resell the goods exclusively to parties in the Middle East and that such behaviour amounted to an anticipatory breach of contract; as a result, it was no longer bound to pay interest, nor the remaining € 257.12 which had been withheld for bank costs.

The Court found CISG to be applicable since both Spain and Germany are Contracting States (Art. 1(1) CISG) and that a contract had been formed in accordance with Art. 23 CISG.

As to the merits, the Court found that the buyer had not committed any anticipatory breach because its obligation was only to deliver the goods to a subsequent customer in the Middle East, not to control where this customer was going to resell the goods. Moreover, the Court found that the contract at hand was neither a distributorship contract, nor an instalment contract governed by Art. 73(2) CISG, since it had been agreed that there would be only one delivery of the goods. Thus, the seller could not avoid the contract by claiming for an anticipatory breach by the buyer.

The Court then found that, since the buyer had fulfilled its obligations while the seller had breached its obligation to deliver the goods, the buyer was entitled to declare the contract avoided (**Art. 49(1)(a) CISG**) and consequently to collect damages under **Article 45 CISG**, as well as those provided for by Arts. 74 – 77 CISG.

The Court first found that the buyer had the right to recover the amount it had previously paid to the seller, as required by Art. 81(2) CISG, plus interest on that amount, per Art. 84(1) CISG. The Court then awarded the buyer legal fees as well as lost profits (Art. 74 CISG)

[3] Text celého rozhodnutí je k dispozici na adrese: http://cisgw3.law.pace.edu/cases/060522s4.html

calculated as the difference between the purchase price and the price agreed upon by the buyer and the subsequent customer.

Date: 23.05.2005
Country: Austria
Number: 3Ob193/04k
Court: Oberster Gerichtshof
Parties: --

Abstrakt:[4]

An Austrian company (the seller) sold coffee machines to an Italian company (the buyer) which intended to sell them on to its customers. Approximately one month after the first coffee machines were operated by the buyer's customers the buyer started to receive complaints relating to defects in the goods (electric short circuit and water leakage stemming from outdated and defective construction of the machines). Notwithstanding several attempts by the buyer and by the seller to repair the machines, the defects persisted.
The buyer refused to pay the price for the goods, claiming that they had lost their entire value, and tried to return to the seller both the defective machines and the ones which were still packaged; the seller however refused to take the goods back and brought an action for payment of the outstanding price.
The first and second instance Courts rejected the seller's claim and the seller appealed to the Supreme Court.

The Court first of all confirmed the lower instances' decisions that the buyer was entitled to remedies for lack of conformity since the machines were undoubtedly unfit for their ordinary use, the seller had been aware of the defects from the beginning (Art. 40 CISG) and had not successfully cured them under **Art. 48 CISG**. The buyer however lost its right to declare the contract avoided since it had not given notice to the seller within a reasonable time as per **Art. 49(2)(b) CISG**.

As to the application of the remedy of price reduction under **Art. 50 CISG**, the Court observed that this provision does not set any time-limit to the exercise of the action by the buyer. The Court then referred to diverging scholarly interpretations of Art. 50 as to the possibility for the buyer to invoke it also when the goods – as in the case at hand – were completely worthless and unsaleable, thereby reducing the price to a zero sum. According to the prevailing view, such a right should be recognized precisely for the situations where the buyer lost its right to declare the contract avoided. Another view contends on the contrary that the reduction of the price to a zero sum would practically have the same effects of an avoidance and therefore it should be subject to the same restrictive conditions applicable to the latter remedy.

The Court chose the first opinion holding that the remedy of price reduction is not dependent on conditions set for the different remedy of avoidance and that Art. 50 CISG admits a reduction of the price also up to a zero sum in case of complete loss of value of the sold goods. In reaching this conclusion the Court, first observing that CISG must be interpreted autonomously and not referring to domestic law (Art. 7 CISG), took into account the clear meaning of Art. 50 which does not limit price reduction to specific situations.

[4] Text celého rozhodnutí je k dispozici na adrese: http://cisgw3.law.pace.edu/cases/050523a3.html

Date: 08.11.2005
Country: Austria
Number: 4 Ob 179/05k
Court: Oberster Gerichtshof
Parties: --

Abstrakt:[5]

An Italian seller and an Austrian buyer entered into a contract for the design, manufacture and delivery of a machine to be used to crush and cleanse monitor and computer screen glass. After installation and use, the machine failed to work properly. Following the buyer's complaints, the seller made several attempts to remove the defects, for which it requested payment. Since after intervention by the seller's technicians the machine was still not working, the buyer refused to pay both the outstanding purchase price and the additional service provided by the seller. The latter, arguing that the buyer had not used the machine properly and had tried to crush materials other than those for which the machine had been designed, commenced an action against the buyer to recover the sum allegedly owed to it. The buyer counterclaimed damages alleging loss of orders from its customers and costs for cleansing the machine.

The Court of First Istance dismissed the seller's claim by applying Italian law pursuant to Art. 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

The Court of Appeal held – inter alia – that the first instance Court should have applied CISG to settle the dispute, because when a party ordering the goods does not supply a substantial part of the materials needed to manifacture them, contracts for supply of goods to be manufactured or produced are to be considered equivalent to contracts for the sale of goods (Art. 3(1) CISG). Therefore, also timeliness and specificity of notice of lack of conformity by the buyer were to be assessed not according to Italian law but according to the relevant provisions of CISG (Arts. 38, 39 CISG). However, since there was no case law by the Supreme Court on the question as to whether CISG would allow a general right to refuse performance, including non conformity of goods, the Appellate Court gave the seller leave to appeal to the highest instance on this particular issue.

The Supreme Court left the question open as to whether CISG was applicable to the case at hand. In the Court's view, in order to answer such a question, the first instance Court had to evaluate whether obligations typical for the law of sale were preponderant with respect to obligations alien to the law of sale, either in monetary terms or according to the intention of the parties. If the first ones were not preponderant, the Convention could not be applied (Art. 3(2) CISG). The Supreme Court further stressed that such a solution was determinant for the dispute since Italian law and CISG diverge with respect to the matters at issue.

However, the Court took the scholarly view that the existence of one party's general right to withhold performance in case of breach of contract by the other party would be among the matters governed but not expressly settled by the Convention (Art. 7(2) CISG). In accordance

[5] Text celého rozhodnutí je k dispozici na adrese: http://cisgw3.law.pace.edu/cases/051108a3.html

with the principle of simultaneous exchange of performances underlying Arts. 71, 58, 86 CISG, the buyer would then be entitled to allege that the contract had not been properly performed and to withhold its own performance until the seller were willing to perform; in the case of a contract for the sale of a future good – as in the case at hand - , the buyer requesting substitute delivery or repairs under **Art. 46 CISG** would be allowed to withhold payment until the seller had performed in conformity with the contract. In this perspective, the law governing defective performance under CISG would not diverge much from Italian law (Art. 1668 Italian Civil Code).

On the contrary, Italian law and CISG provide for different solutions with regard to notice of lack of conformity. Whereas the Italian Civil Code requires the principal to notify the contractor of the defects within 60 days of discovery and legal action against the contractor is time-barred unless it has been brought within two years of delivery, under CISG the buyer must examine the goods within as short a period as is practicable under the circumstances (**Art. 38(1)**) and it loses its right to rely on lack of conformity if it does not give notice thereof to the seller within a reasonable time from when it has discovered or ought to have discovered lack of conformity or, in any event, after two years from when the goods have been handed over to the buyer (**Art. 39 CISG**).

Date: 17.12.2001
Country: USA
Number: 1:01-CV-691
Court: U.S. District Court, S.D., Michigan
Parties: Shuttle Packaging Systems, L.L.C. v. Jacob Tsonakis, INA S.A., et al.

Abstrakt:[6]

A Greek seller (Defendant) agreed to supply thermoforming lining equipment for the manufacture of plastic gardening pots to a U.S. buyer (Plaintiff). The contract included terms relating to, inter alia, supply of technology and assistance in the use of the equipment, and a non-competition agreement (the full terms of which were to be contained in a later, separate document). The parties then concluded the non competition agreement which contained covenants for the seller not to engage in selling its equipment and processes within a so called "restricted area", and not to disclose or use trade information or customer lists of the buyer. The restricted area was not defined specifically in the contract. Although the contract did not specify the law applicable to the purchase of goods, it did state that the non-competition agreement was to be enforced in accordance with the laws of the state of Michigan.

The buyer began to experience complications with the equipment and alleged that it failed to conform to seller's specifications and industry standards. The seller on its part alleged negligent operation of the machinery on the part of the buyer. After the buyer unilaterally suspended payment for the goods, the seller began to compete in the market for distribution of plastic gardening pots, which constituted an alleged violation of the non-competition agreement. The buyer seeks damages for breach of contract and violation of the non-competition agreement. In the motion before the Court, buyer sought to restrain the seller from selling pots in the North American market pending the outcome of the case.

As to the applicable law, the Court held that CISG applied generally to the dispute because it involved a contract for the sale of goods between parties having their places of business in different contracting States (Art. 1(1)(a) CISG). As a result of the choice of law clause stating that Michigan law would apply to the non-competition agreement, the Court held that law of Michigan would apply to determine liability under the non-competition agreement.

Although the Court held that Michigan law applied to the non-competition agreement, the Court applied Arts. 8 and 9 CISG to determine the intent of the parties in interpreting that agreement. The Court held that, since the parol evidence rule does not apply to contracts under CISG, the geographic application of the non-competition agreement should be interpreted based on the subjective intent of the parties and based on their prior and subsequent statements and conduct. It then concluded that the "restricted area" meant all North America.

The Court also rejected the buyer's argument that the non-competition agreement was invalid for lack of consideration. On this subject, the Court held that, under Art. 29 of CISG, a contract may be modified without consideration.

[6] Text celého rozhodnutí je k dispozici na adrese:
http://www.unilex.info/case.cfm?pid=1&do=case&id=732&step=Abstract

The Court further held that the buyer complied with **Arts. 38 and 39 of CISG** by examining the goods as soon as practical under the circumstances and by giving notice of lack of conformity within a reasonable time. In reaching this conclusion, it took into account that the goods involved (unique and complicated equipment, delivered in installments and subject to training and on-going repairs on the part of Seller's engineers) gave ample ground for a period of notice longer that the one usually required for simple goods.

The Court however found that the alleged lack of conformity most likely did not constitute a seller's fundamental breach of contract under **Art. 49 CISG**, which would have entitled the buyer to avoid the contract. The Court found that on the contrary, the non payment for the goods on the part of the buyer did constitute a fundamental breach, thus allowing the seller to suspend performance under **Art. 64 CISG**.

As a result of the buyer's likely fundamental breach of contract, the Court found that the seller was most probably entitled to disregard the non-competition agreement.